Filed 3/15/16 In re A.S. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. A.S., Defendant and Appellant.	E063044 (Super.Ct.Nos. RIJ1500054 & KJ38888*) OPINION

APPEAL from the Superior Court of Riverside and Los Angeles Counties. Roger A. Luebs and Geanene Yriarte, Judges. Affirmed.

* Roger A. Luebs, Judge of the Superior Court of Riverside County, accepted the transfer of the matter from Los Angeles County to Riverside County and placed minor on probation. (Case No. RIJ1500054) Geanene Yriarte, Judge of the Superior Court of Los Angeles County, found true the allegation in the petition. (Case No. KJ38888.) Minor appeals the juvenile court's finding that the allegation in the petition was true.

David Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Christen Somerville and Joy N. Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

A petition under Welfare and Institutions Code section 602 was filed against defendant and appellant A.S. (minor), alleging he committed one count of making criminal threats. (Pen. Code,[1] § 422, subd. (a).) The Juvenile Court of Los Angeles County found the allegations true. Minor's case was transferred to Riverside County for a dispositional hearing, where the offense was reduced to a misdemeanor. Minor was granted six months' nonwardship probation. (Welf. & Inst. Code, § 725, subd. (a).)

On appeal, minor argues insufficient evidence supports the court's finding that he made a criminal threat under section 422. We disagree and affirm the judgment.

FACTUAL BACKGROUND

On March 30, 2014, a 24-year veteran narcotics detective of the Santa Ana Police Department was acting as the referee in a youth soccer game for boys under 16. Minor was a participant in the game. The referee heard minor say to an opposing player, "Fuck you." The referee ejected minor from the game for using abusive language. In response, minor said to the referee, "Fuck you too, ref." From about an arm's length away, minor then told the referee in a "loud" voice that he (minor) was "going to kill [the referee] and

[1] All further statutory references are to the Penal Code unless otherwise noted.

shoot [the referee] with [his] gun." Minor simultaneously simulated a gun with his hand—the index finger of minor's hand was extended straight, pointing at the referee, with the thumb up and the remaining fingers curled. Minor repeated this statement "about three more times" while keeping his hand pointed toward the referee in the shape of a gun. Minor faced the referee the entire time, keeping the finger of his simulated gun pointed at the referee while backing up toward the sideline. The referee was "surprised" by minor's reaction, and told minor's coach that he took minor's statements "seriously," and that minor could no longer "remain in the game" or "in the vicinity." A man escorted minor from the facility. The referee debated whether to stop the game and call the police. The referee decided to keep the game going. During breaks in play, the referee would turn back toward the main boulevard to see if minor was returning.

After the game was over, one of the assistant referees suggested the referee call the Sheriff's Department, because a player in the past had made similar remarks to the assistant referee, and the police had found a gun in the car of that player's father at the game. The referee also had heard of physical altercations between participants and referees at the games. The referee decided to call the Sheriff's Department, and he gave a report to a responding deputy. The referee was still "concerned for [his] safety" and continued to look for minor as he left the game. The referee drove a circuitous route home to make sure minor did not follow him. The referee had never seen minor before the March 30 game. Following the March 30 game, the referee decided that he would carry a concealed firearm to future youth soccer games.

DISCUSSION

1. *PROPER STANDARD OF REVIEW*

Minor argues that insufficient evidence supports the juvenile court's true finding that he made a criminal threat, but we respond first to a threshold contention he makes concerning the proper standard of review we should use to evaluate his argument. Minor contends that we should evaluate his sufficiency of the evidence claim under the stricter independent standard of review rather than under the more lenient sufficiency of the evidence standard of review, because punishment for the offense of making criminal threats possibly infringes his right to free speech under the First Amendment of the United States Constitution. We disagree that we should apply independent review in this case.

The California Supreme Court held that an appellate court may apply the independent standard of review to a sufficiency of the evidence claim in a criminal threats case, but only where the minor first raises a "plausible First Amendment defense." (*In re George T.* (2004) 33 Cal.4th 620, 632 (*George T.*).) In *George T.*, a minor high school student was prosecuted for making a criminal threat by writing a violent "dark" poem for a poetry class. (*Id.* at p. 625.) The minor argued punishing him for the poem implicated First Amendment interests warranting independent review. (*Id.* at p. 631.) The California Supreme Court held that the minor had raised a plausible First Amendment defense, because the creatively ambiguous expression inherent in his poem presented "special circumstances." (*Id.* at p. 634.) In light of *George T.*'s holding, a

plausible First Amendment defense requires that the words at issue and their surrounding circumstances exhibit, on their face, the hallmarks of protected speech, such as advancing creative expression, dialogue, the expression of emotions or feelings, persuasion, or the exchange of ideas or opinions.

Here, the words and circumstances do not exhibit on their face the hallmarks of protected speech that trigger our independent review under *George T.* Minor stated that he "was going to kill" and "shoot" the referee with "[his] gun," and he accompanied this statement with an unambiguous gesture of violence—the simulated gun—that he personally directed, in a face-to-face encounter, at the referee, a person to whom minor was unknown. Not only did minor single out the referee, but he also kept the simulated gun trained on the referee long enough to repeat the statement three times. On their face, minor's words and the circumstances surrounding them strayed from the hallmarks of speech that the First Amendment protects. Thus, minor fails to raise a plausible First Amendment defense triggering our independent review, and so we apply the usual sufficiency of the evidence standard to his claim. (E.g., *People v. Wilson* (2010) 186 Cal.App.4th 789, 805.)

Minor contends that his "inartful prose" at the March 30 game is no less deserving of First Amendment protection than the *George T.* minor's "poetry." In support, minor cites *Cohen v. California* (1971) 403 U.S. 15 for the proposition that, even though his speech did not rise to the "level of art, literature, or intelligent commentary," the state cannot punish him for engaging in speech of even slight social value unless that speech

clearly falls within one of the First Amendment's established exceptions. For that reason, minor presses, we should use independent review to more fully ensure his words do not fall into the exception for true threats. It is true enough that the state cannot punish minor for engaging in speech of even slight social value. But wearing a jacket that says, " ' "Fuck the Draft" ' " (*Cohen*, at p. 16) is nothing like saying, in a face-to-face encounter, I am "going to kill [you] and shoot [you] with [my] gun," while simultaneously simulating a gun. The former conveys to the world a general opinion about " 'public men and measures' " (*id.* at p. 26), whereas the latter conveys to an individual the commission of a specific " 'act of violence' " (*id.* at pp. 16-17).

In sum, defendant fails to raise a plausible First Amendment defense based on the facts of his case that would trigger our independent review of the record, and so we apply the sufficiency of the evidence standard of review. (*People v. Wilson*, *supra*, 186 Cal.App.4th at p. 805.)

2. SUFFICIENCY OF THE EVIDENCE

Minor argues insufficient evidence supports the juvenile court's true finding with respect to three of the elements of section 422 under either the independent review standard or the sufficiency of the evidence review standard. We disagree.

When a minor challenges the sufficiency of the evidence supporting the juvenile court's true finding of the criminal allegations, we apply the same standard of review that applies to any claim made by a criminal defendant challenging the sufficiency of the evidence on appeal. (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1371; see *In re Y.R.*

(2014) 226 Cal.App.4th 1114, 1118.) We review the entire record in the light most favorable to the judgment to determine whether it contains reasonable, solid, credible evidence from which a reasonable trier of fact could find the criminal allegations against the minor true beyond a reasonable doubt. (See *People v. Johnson* (2015) 60 Cal.4th 966, 988.) We do not invade the province of the trier of fact by reweighing the evidence, or by re-reconciling competing circumstances and redrawing competing inferences from those circumstances; it is the trier of fact—not the appellate court—which must be convinced beyond a reasonable doubt of the truth of the allegations against the minor. (See *People v. Alexander* (2010) 49 Cal.4th 846, 917; *People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) Even the testimony of a single witness may provide the trier of fact with sufficient evidence to support a true finding. (See *People v. Elliott* (2012) 53 Cal.4th 535, 585.) To succeed under this review, then, a minor bears the heavy burden of establishing that no reasonable trier of fact could have found the criminal allegations true beyond a reasonable doubt. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1289-1290.)

As relevant here, to sustain a true finding for making a criminal threat, the People must prove the following three elements beyond a reasonable doubt: (1) that the minor "made the threat 'with the specific intent that the statement [was] to be taken as a threat, even if [the minor had] no intent of actually carrying it out' "; (2) that the threat "was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution' "; (3) and that the threat caused the

person threatened to be in a sustained fear for his or her own safety that is " 'reasonabl[e] under the circumstances.' " (*People v. Toledo* (2001) 26 Cal.4th 221, 228 [citing and quoting § 422 & *People v. Bolin* (1998) 18 Cal.4th 297, 337-340 & fn. 13].) We address each element one by one.

a. Specific Intent

Typically, the circumstances surrounding a statement will tend to show whether the statement was uttered with section 422's requisite intent that the recipient take the statement as a threat. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1222 [discussing proper jury instructions when the specific intent element of an offense rests on circumstantial evidence]; *In re Ernesto H.* (2004) 125 Cal.App.4th 298, 313 [using circumstantial evidence to examine the minor's specific intent in a criminal threats case].)

Here, minor stated to the referee that he would shoot and kill the referee. The statement conveyed a sense of injury and lethality. Minor made the statement in a loud voice, and repeated it three times. Minor made the statement for the first time at the distance of an arm's length from the referee. Minor simulated a gun with his hand. Minor kept his simulated gun trained on the referee each time minor uttered the statement. The minor walked backward while facing the referee with the simulated gun, rather than simply turning around and leaving. These circumstances reasonably support the trier of fact's inference that minor intended the referee to take the statement as a threat.

Minor contends that no evidence suggested he was doing anything other than intemperately "venting his anger" to the referee over being ejected from the game. If minor had limited himself only to saying, "Fuck you too, ref," as he had done immediately following his ejection, then we would agree that would have been a constitutionally protected expression intending to convey minor's opinion regarding the soundness of the referee's call. But minor ignores the surrounding circumstances, which, when coupled with the lethal nature of the statement itself, reasonably support the juvenile court's inference that minor's intent went farther than mere venting. We will not redraw that inference on appeal.

In sum, sufficient evidence supports the juvenile court's finding that minor made the statement at issue with the specific intent that the referee take it as a threat.

b. Unequivocality, Unconditionality, Immediacy, and Specificity

The four qualities described in this element of the offense " 'are simply the factors to be considered in determining whether a threat, considered together with its surrounding circumstances, conveys those impressions to the victim.' " (*George T.*, *supra*, 33 Cal.4th at p. 635.) Thus, a reviewing court should examine the circumstances to determine whether the threat "express[es] an intention of being carried out," even if the minor does not subjectively intend to *actually* carry it out. (*People v. Bolin* (1998) 18 Cal.4th 297, 339, citing *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1026 [forming the basis for section 422's statutory language]; see § 422.)

Here, minor's statement communicated to the referee that minor "*was going to*" shoot the referee with "[minor's] gun." (Italics added.) Again, minor repeated that statement three times, and he accompanied each repetition of the statement with a simulated gun. Nothing in the record suggests that minor attempted to engage in joking or unserious banter with the referee. For instance, minor and the referee did not have a close relationship, nor did they have any prior experience with one another. No evidence suggests that other participants present at the March 30 game took minor's statements and gesture as a joke or as another kind of unserious expression. Instead, minor's statement and gesture implied that minor had some access to a gun and intended to do to the referee what he said he would do, with the surrounding circumstances suggesting this was the impression communicated to the referee.

Minor contends the surrounding circumstances support the *opposite* conclusion. Given that no evidence in the record suggests a history of animosity or conflict between minor and the referee, the referee would have perceived throughout the encounter that no physical confrontation was imminent. Minor contends these same circumstances led our high court to conclude in *George T.* that the poem there did not constitute a threat. Minor thus concludes that we should follow *George T.*, as well as the cases of *In re Ryan D.* (2002) 100 Cal.App.4th 854 (*Ryan D.*) and *In re Ricky T.* (2001) 87 Cal.App.4th 1132 (*Ricky T.*), and conclude that minor's actions were a vague emotional outburst rather than a specific criminal threat.

George T. is distinguishable because of the more ambiguous and creatively written nature of the communication (i.e., the minor high school student's poem written for class) at issue there. *George T.* did note an entire raft of incriminating circumstances that were lacking in the case, one of which was a lack of prior history of animosity between the minor and the other students who read the poem. (*George T.*, *supra*, 33 Cal.4th at pp. 637-638.) Such a lack of personal history, as in *George T.*, may indicate harmlessness when the recipient of the communication is reading an ambiguous piece of writing meant for a poetry class or a broad audience. However, that *same* absence of personal history, as here, may cut the *other way* when the recipient of the communication is personally confronted, face-to-face, with language and gestures meant to convey the impression of targeted, individualized harm to the recipient.

Ryan D. is similarly distinguishable. In that case, the court found no evidence suggesting the minor student's graphically violent painting he made for an art class, which depicted the minor student shooting in the head a school peace officer who had cited him a month earlier for possessing marijuana, was "accompanied by any words" or "any gestures" that would convey a sense of unequivocality or immediacy. (*Ryan D.*, *supra*, 100 Cal.App.4th at pp. 857, 864.) Here, in contrast, minor made his statements immediately and directly to the referee, and accompanied them with the gesture of a simulated gun pointed at the referee.

Finally, *Ricky T.* is also distinguishable. In that case, the court found no evidence suggesting that the minor student's "vague" threats to " 'get' " and to " 'kick [the] ass' "

of the teacher who had accidentally hit the minor in the face by opening a classroom door were accompanied by "a physical show of force," such as the minor student's "display[ing] his fists." (*Ricky T.*, *supra*, 87 Cal.App.4th at pp. 1137-1138.) Here, minor's repeated statements conveyed that he was going to "shoot" the referee. In contrast to "get[ting]" a person or to "kick[ing a person's] ass," the verb "shoot" conjures in the mind of the recipient a clear, specific act of harm. That verb takes even clearer shape when, as here, it is accompanied by an illustrative, forceful gesture directed at the recipient.

In sum, sufficient evidence supports the juvenile court's true finding that minor's statement, on its face and under the circumstances, was sufficiently unequivocal, unconditional, specific, and immediate so as to convey to the referee the impression of being carried out.

c. Objective Reasonableness of Sustained Fear

To be a criminal threat under section 422, the statement at issue must instill in the recipient a subjectively felt sustained fear that is objectively "reasonable under the circumstances." (*Ricky T.*, *supra*, 87 Cal.App.4th at pp. 1140-1141, citing section 422.)

Here, the referee had no experiences with minor prior to the March 30 game, and he did not know what sort of person minor generally was. The referee had heard of past physical altercations between game participants and other referees. Minor stated that he was going to shoot the referee, and he repeated that statement with a simulated gun. The referee told minor's coach that minor should be taken from the vicinity. The referee

watched for minor returning to the soccer field after being ejected. Immediately following the game, the referee called the Sheriff's Department and gave a report to the responding deputy. The referee continued to look for minor as he went to his car, and he went so far as to drive a circuitous path home to ensure he was not followed. Given the lethal nature of minor's statement, coupled with the referee's lack of personal knowledge as to the sort of person minor was and his knowledge of previous instances of physical confrontations in youth soccer games, the referee's sustained fear appears objectively reasonable under the circumstances.

Minor contends the surrounding circumstances belie both the reasonableness of the referee's sustained fear and whether the referee even felt sustained fear at all. First, minor notes that the referee was a narcotics detective with the Santa Ana Police Department with over two decades of experience. Second, minor notes that the referee did not immediately stop the game and send the participants home in light of minor's statement and gesture, which, as an experienced officer, he would have done had he genuinely feared a gun attack. Finally, minor notes that the referee waited until after the game was over to call the authorities. Minor contends our case is similar to *Ricky T.*, in which the victim waited a day to call authorities about the minor student's statements and behavior there. Based on this evidence, the court in *Ricky T.* held that the teacher was not in an objectively reasonable state of sustained fear. (*Ricky T.*, *supra*, 87 Cal.App.4th at p. 1140.)

Here, in contrast, the evidence showed the referee internally debated whether the best course of action would have been to stop the game immediately and call the police, or allow the game to continue. The referee opted for the latter course, and even then, he kept a lookout for minor as the game progressed. As soon as the game was over, the referee called the authorities. The referee thus exercised a form of vigilance over the remainder of the game, presumably drawing on his professional experience and judgment as an officer to come to that decision. No evidence in *Ricky T.* suggested the teacher exercised a similar form of vigilance in the face of the minor student's behavior there. Moreover, the referee extended that vigilance beyond the close of the game, keeping a lookout for minor on his way home. The referee continues to exercise vigilance, as he now carries a concealed firearm to youth soccer games he referees.

In sum, sufficient evidence supports the juvenile court's true finding that the referee felt a sustained fear that was objectively reasonable under the circumstances.

d. Conclusion

Based on the entire record, we find sufficient evidence supports the juvenile court's true finding that the minor made a criminal threat under section 422.

DISPOSITION

The juvenile court's true finding is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.